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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1038 103

DUQUESNE WAREHOUSE COMPANY, *Petitioner*,

v.

RAILROAD RETIREMENT BOARD AND BROTHERHOOD OF RAILWAY AND STEAMSHIP-CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, *Respondents*.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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Petitioner, Duquesne Warehouse Company, respectfully prays that a writ of certiorari issue to review the final decision of the United States Court of Appeals for the District of Columbia entered on May 14, 1945 (R. 316), reversing the judgment of the District Court of the United States for the District of Columbia (R. 299-300), which set aside and annulled a decision of the Railroad Retirement Board that the Duquesne Warehouse Company is an "employer" within the meaning of the Railroad Unemployment Insurance Act (R. 227-284).

Petitioner respectfully requests that this Court review the decision below, along with its consideration of the directly conflicting decision of the United States Circuit Court of Appeals for the Second Circuit in the case of *Railroad Retirement Board, et al.* v. *Duquesne Warehouse Company*, involving the identical issue here presented; respondents here, petitioners in that case, having filed with this Court on May 28, 1945 petition for writ of certiorari to review that decision (No. 1324, October Term, 1944).

## Opinions Below.

The opinion in the District Court is not reported and will be found at pages 298-299 of the record. The opinion of the United States Court of Appeals for the District of Columbia has not yet been reported and will be found at pages 311-315 of the record.

## Basis for Jurisdiction.

It is competent for this Court to require by certiorari that the cause be certified to it for review pursuant to the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938, amending and re-enacting Section 240(a) of the Judicial Code, 28 U. S. C. A., Sec. 347, and Rule 38 of the Rules of this Court.

## Question Presented.

Whether a warehouse company, whose stock is owned by a railroad company subject to Part I of the Interstate Commerce Act, but which conducts a commercial warehouse business separate from the business of the railroad company, although the majority of its traffic comes in and moves out by that railroad, is a "company * * * which operates any equipment or facility or performs any service * * * in connection with the transportation of * * * property by railroad, or the receipt, delivery, elevation, transfer in transit, * * * storage, or handling of property transported by railroad," and hence an "employer" within the meaning of Section 1(a) of the Railroad Unemployment Insurance Act.

## Statute Involved.

The statute involved is the Railroad Unemployment Insurance Act, Act of June 25, 1938, c. 680, Sec. 1(a) (52 Stat. 1094), as amended August 13, 1940, c. 664, Sec. 1 (54 Stat. 785), and October 10, 1940, c. 842, Sec. 20 (54 Stat. 1094), U. S. C. Title 45, Secs. 351 (a), 355 (c) (f).

## Summary Statement of Matter Involved.

This is a coverage case arising under the Railroad Unemployment Insurance Act. Petitioner, Duquesne Warehouse Company, hereinafter referred to as "Duquesne," filed suit in the District Court of the United States for the District of Columbia to review the decision of the Railroad Retirement Board that petitioner is an "employer" under Sec. 1(a) of the Railroad Unemployment Insurance Act. The District Court (Bailey, J.) set aside and annulled that determination (R. 298-300).

The judgment of the District Court was reversed by the United States Court of Appeals for the District of Columbia, Chief Justice Groner and Associate Justices Miller and Arnold sitting, opinion by Associate Justice Arnold, May 14, 1945, and the case was remanded to the District Court with instructions to enter a summary judgment affirming the decision of the Railroad Retirement Board (R. 316).

The issue in this case is identical with that presented in the case of *Railroad Retirement Board, et al. v. Duquesne Warehouse Company*, No. 1324, October Term, 1944, wherein petition for writ of certiorari was filed in this Court on the 28th day of May, 1945, to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, involving the coverage of the Duquesne Warehouse Company under the Railroad Retirement Act. The definition of "employer" in the Retirement Act is identical with that contained in the Unemployment Insurance Act. The facts in the two cases are the same and the parties are the same, with the exception that George M. Harrison, Presi-

dent of the Brotherhood, intervened, along with the Brotherhood, in the Retirement Act case and not in the instant case. The record before the Retirement Board in the Retirement Act proceeding also constituted the record before the Board in the Unemployment Act proceeding and this record was before the Courts below in both cases here sought to be reviewed.

In the Retirement Act case, No. 1324, suit was brought by Duquesne in the District Court of the United States for the Southern District of New York to set aside the final determination of the Railroad Retirement Board that it was an "employer" under the Railroad Retirement Act and that Court (Goddard, J.) set aside and annulled that determination (R. 282-292 in No. 1324), 56 Fed. Supp. 87. The judgment of the District Court was affirmed by the United States Circuit Court of Appeals for the Second Circuit, Circuit Judges Chase, Hutcheson and Frank sitting, opinion by Circuit Judge Hutcheson, Judge Frank dissenting, March 12, 1945 (R. 302-323 in No. 1324), and rehearing was denied April 23, 1945 (R. 327 in No. 1324).

In both the Unemployment Insurance Act and the Retirement Act the definition of "employer," insofar as material here, reads as follows:

> "The term 'employer' means any carrier (as defined in subsection (b) of this section); and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, * * *"[1]

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[1] Subsection (b) defines the term "carrier" as "an express company, sleeping-car company, or carrier by railroad, subject to part I of the Interstate Commerce Act." Act of February 4, 1887, c. 104 (24 Stat. 379), U. S. C. Title 49, Sec. 1, *et seq.*

This same definition is carried in the Carriers Taxing Act of 1937, Act of June 29, 1937, c. 405 (50 Stat. 435), U. S. C. Title 45, Sec. 261 (a). The Taxing Act is the companion statute under which money is collected for the payment of annuities and pensions under the Retirement Act.

Likewise, the Railway Labor Act as amended, Act of June 21, 1934, c. 691 (48 Stat. 1185), U. S. C. Title 45, Sec. 151, carries an employer definition almost identical with that in dispute here.[2]

Duquesne, whose stock is wholly owned by The Pennsylvania Railroad Company (R. 23), hereinafter referred to as "Pennsylvania," was incorporated under the laws of the Commonwealth of Pennsylvania, August 1, 1906, "for the purpose of conducting a storage and warehouse business" (R. 31). It has no other charter powers. It issues warehouse receipts under the governing Pennsylvania statute, copies of which appear in the record (R. 117-118). Its services are under the direction of a Superintendent "who has full and unrestricted authority to conduct a commercial warehouse business in accordance with the charter of the company" (R. 85). It has long been classed in the trade as a warehouseman conducting a commercial warehouse business. During the life of the National Industry Recovery Act, Act of June 16, 1933, c. 90 (48 Stat. 195), it was a subscriber to the Code of Fair Competition for the Merchandise Warehousing Trade, and was assigned a specific certificate number under that Code (R. 135).

"Its operations are confined to two warehouses, one at East Liberty and the other at Pittsburgh. Both warehouses

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[2] "The term 'carrier' includes any express company, sleeping car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad. * * *" (Sec. 1, First.)

are owned by the railroad company and leased to the warehouse company with the exception of a portion of each building on the ground floor which is retained by the railroad company and used and officially designated by the railroad company as its freight agency. The railroad company maintains an agency force at each. These stations are fully equipped with tracks and other facilities for the receipt, delivery and handling of inbound freight and outbound, both carlot and less. The operations of each are separate from the operations of the warehouse. Each warehouse has a siding where delivery is made by the railroad company in carlots to the warehouse company. The owner unloads. The warehouse company performs the work and charges the owner. On outbound carload shipments the owner loads on the same siding. The warehouse company does the work and charges the owner. On inbound deliveries and outbound shipments of less than carload freight such delivery and receipt are made and given by the railroad agency at the warehouse. Inbound the warehouse company takes the freight from the railroad platform, and outbound delivers it at the railroad platform. It receipts to the railroad inbound, and takes a railroad bill of lading outbound" (R. 81).

At East Liberty the only commodity handled is sugar in carloads. "Delivery is made to the warehouse company in placing the car on the siding of the warehouse company." (R. 81). At the other warehouse in Pittsburgh proper, both carload and less-than-carload shipments are handled, and the operations there as to carload shipments are similar to those at East Liberty (R. 232).

Carload freight is carried by the Pennsylvania at carloads rates (R. 82); and loading and unloading by the owner is required by governing railroad tariffs. While the freight is in the warehouses it is under the exclusive control and direction of the owner. The responsibility of Duquesne is that of warehouseman. During that time the services accorded the property are the usual commercial warehouse services, such as storing, segregating, packaging, as-

sembling and the like for distribution from Pittsburgh as a center (R. 82).

Some of the freight which comes into the warehouse by rail and moves out by rail is entitled, insofar as the railroad is concerned, to what is known as a transit privilege. That is, it moves on a local rail rate to Pittsburgh, and on outbound movement takes the through rail rate from initial shipping point to ultimate destination, which is usually lower than the combination of the locals into Pittsburgh and out. This is generally called storage-in-transit, but is in fact storage out of transit. The arrangement is altogether as between the owner of the goods and the railroad. It relates to railroad rates only. Duquesne has no part in it. This tariff rule of the Pennsylvania obtains at Pittsburgh on other commodities and at other points on the Pennsylvania as to other named commodities and is open to all shippers (R. 83).

All freight delivered by Pennsylvania to Duquesne, or received by Pennsylvania from Duquesne, is carried by Pennsylvania at tariff rates which are subject to its Consolidated Freight Classification, Section 1, Rule 23 of which provides:

> "Carriers' agents must not act as agents of shippers or consignees for the assembling or distribution of C. L. or L. C. L. freight" (R. 85).

Duquesne "sublets parts of the building at Pittsburgh to tenants who conduct their business there. They are chiefly manufacturing concerns or representatives of manufacturers. The warehouse company has nothing to do with any shipments delivered to them or shipped by them. The railroad treats them the same as any other patrons" (R. 84).

Duquesne has an independent contractor arrangement with Pennsylvania for the disposal of such of its refused, damaged and unclaimed freight as Pennsylvania may care to deliver to the warehouse (R. 128-133). Duquesne reconditions and sells it at a charge of 10 per cent of the gross proceeds, plus any necessary expenses in reconditioning

and handling such as drayage. This is after the freight has finished its transportation and is turned over to Duquesne for disposal by Pennsylvania in a separate and independent transaction (R. 84). This freight has been handled under two contracts—one dated 1 February 1922, and the other dated 2 January 1941. Under neither agreement has any of the freight been delivered by Duquesne to consignee, nor under either agreement has Duquesne under the direction of Pennsylvania ever disposed of any freight which has become so worthless as to be unsalable (R. 127). This is the only money which Duquesne receives from Pennsylvania. During the three years of operation as shown in the record the gross revenues received by Duquesne under this arrangement total less than .7 per cent of Duquesne's gross revenues for all services during those years (R. 233).

For a short period of time—1937-8—Duquesne conducted a similar warehouse business at Erie, Pa., where the only commodity handled was newsprint paper in carloads. It was unloaded inbound on private siding and loaded outbound on the same siding, as is presently done with sugar by Duquesne at East Liberty (R. 86, 232).

Employees of Duquesne are on its payroll only. They are hired by it and discharged by it, and paid solely from its funds. They have a written working agreement with Duquesne and not with Pennsylvania. They are not accorded free transportation by Pennsylvania. Nor are they permitted to become members in two organizations of Pennsylvania, whose memberships are restricted in one instance to its employees and in the other to its employees and former employees. Duquesne has operated and paid under the Federal Social Security Act, and also makes contributions under the State Unemployment Compensation Law (R. 85).

Duquesne files no tariffs with the Interstate Commerce Commission or any state commission. Nor is it a party to any tariff of any railroad company or other common carrier (R. 86).

In the valuation of properties of Pennsylvania—22 I. C. C. Valuation Reports—under the requirements of Section 19

(a) of the Interstate Commerce Act, Part I, these two warehouses where Duquesne conducts its business are not classified as properties devoted to railroad transportation (R. 86).

**Errors to be Urged.**

The Court below erred:

1. In reversing the judgment of the District Court and remanding the cause with instructions to enter a summary judgment affirming the decision of the Railroad Retirement Board that petitioner is an "employer" within the meaning of Section 1(a) of the Railroad Unemployment Insurance Act.

2. In holding that the services which Duquesne renders in its commercial warehouse business are so "closely related to the rail transportation system" of the Pennsylvania and so "intimately connected with" its operations as to be a part of the business of railroads which the Railroad Unemployment Insurance Act was intended to cover.

3. In failing to hold that "service * * * in connection with the transportation of * * * property by railroad," as provided in Section 1(a) of the Railroad Unemployment Insurance Act, relates only to service rendered while the property is in the process of railroad transportation and in the possession of the railroad company.

4. In failing to hold that the Railroad Unemployment Insurance Act relates to the railroad industry and that its coverage does not extend to the warehouse industry.

**Reasons Relied on for the Allowance of the Writ.**

1. On March 12, 1945, the United States Circuit Court of Appeals for the Second Circuit held that petitioner, Duquesne Warehouse Company, was not an "employer" within the meaning of Sec. 1(a) of the Railroad Retirement Act of 1937, 50 Stat. 307, 45 U. S. C., Sec. 228 a (a), the language of which is identical with Sec. 1(a) of the Railroad Unemployment Insurance Act here involved. That case

and the one here sought to be reviewed were tried in the respective District Courts upon motions for summary judgments on the same record, which by stipulation, had been treated by the Board as the record in both proceedings before it. The facts, the issues and the parties in the two cases are identical, except that George M. Harrison, President of the Brotherhood, intervened in the Railroad Retirement Act case and not in the instant case.

The decision of the United States Court of Appeals for the District of Columbia, the review of which is here prayed, is in direct and complete conflict with the decision of the United States Circuit Court of Appeals for the Second Circuit as set forth in the majority opinion of that Court. The opinion of the United States Court of Appeals for the District of Columbia appears at record pages 311-315, and the majority and dissenting opinions of the United States Circuit Court of Appeals for the Second Circuit appear in the record in this Court in No. 1324, October Term, 1944, at pages 302-323.

The decision below also is in conflict with the decisions in *Ocean S. S. Co. of Savannah* v. *Allen, Collector*, 36 F. Supp. 851, affirmed 123 F. 2d 469 (C. C. A. 5, 1941); *Baltimore Steam Packet Co.* v. *Magruder, Collector*, 50 F. Supp. 639, affirmed 144 F. 2d 130 (C. C. A. 4, 1944); and *Interstate Transit Lines* v. *United States*, 56 F. Supp. 332 (D. C. Nebraska, Omaha Div.).

2. These conflicting decisions involve an important question of national scope relating to the administration of Federal statutes dealing with the railroad industry, particularly as to their coverage of the warehousing and other industries whose services are not connected with railroad transportation but may bear a remote relation thereto. Identical definitions of the term "employer" are found in the Railroad Unemployment Insurance Act, 52 Stat. 1094, 45 U. S. C. Sec. 351(a), the Railroad Retirement Act of 1937, 50 Stat. 307, 45 U. S. C. Sec. 228 a (a), and the Carriers Taxing Act, 50 Stat. 435, 26 U. S. C. Sec. 1532(a), and

a similar definition is found in the Railway Labor Act, 48 Stat. 1185, 45 U. S. C. 151, First. Employers subject to these statutes are exempt from the provisions of the Social Security Act (52 Stat. 1110-1111, 53 Id. 1374, 42 U. S. C. Sections 409 (b) (9), 1107 (c) (8), 45 U. S. C. Section 363 (a) and from the National Labor Relations Act 49 Stat. 450, 29 U. S. C. Section 152 (2)), under which the taxes and benefits are not the same as those under the aforementioned Railroad acts.

3. As the obvious conflict and the importance of the question involved so clearly demonstrates the necessity for a review by this Court of the decision below, along with that of the United States Circuit Court of Appeals for the Second Circuit, petitioner has not attempted in this petition to set forth at length its contentions on the merits of the controversy. The position of petitioner is stated at some length in the dissenting opinion of M. R. Reed, Member, Railroad Retirement Board (R. 256-284), and in the opinion of Circuit Judge Hutcheson, appearing at record pages 302-308, in No. 1324, October Term, 1944, in this Court.

## Conclusion.

It is respectively submitted that a writ of certiorari should issue from this Court to review the decision of the United States Court of Appeals for the District of Columbia, along with the conflicting decision of the United States Circuit Court of Appeals for the Second Circuit, which respondents have petitioned this Court to review in No. 1324, October Term, 1944.

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